

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:07-CV-00739**

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**DAVID F. EVANS, *et al.*,**

**Plaintiffs,**

**v.**

**THE CITY OF DURHAM,  
NORTH CAROLINA,  
*et al.*,**

**Defendants.**

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**THE CITY OF DURHAM’S  
MOTION TO DISMISS PLAINTIFFS’  
SECOND AMENDED COMPLAINT**

The City of Durham, North Carolina (the “City”), by and through its attorneys, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby moves the Court to dismiss all claims against the City in Plaintiffs’ Second Amended Complaint, for failure to state a claim upon which relief can be granted.

IN SUPPORT WHEREOF, the City respectfully shows the following:

1. Federal claims: Plaintiffs’ causes of action brought upon federal grounds (Causes of Action 5, 7-12) and its prayer for injunctive relief are deficient for the reasons described in the City’s prior briefing—its opening and reply briefs in support of its motion to dismiss Plaintiffs’ First Amended Complaint (Doc. Nos. 43 & 65) and its supplemental supporting brief (Doc No. 100). Pursuant to this Court’s order (Doc. No. 115), the City incorporates those briefs and accompanying exhibits, along with its suggestion of subsequently decided authority (Doc. No. 114), in support of this Motion.

2. State common-law claims: The claims brought against the City pursuant to the common law of North Carolina (Causes of Action 13-22) are deficient for the reasons set out in briefs already before this Court.<sup>1</sup> Namely:

- The City's opening brief in support of its motion to dismiss (Doc. No. 43) at 11-19 (City not responsible for Nifong or DSI as a matter of law); and reply brief in support of its motion to dismiss (Doc. No. 65) at 8-12 (same);
- The City's supplemental brief in support of its motion to dismiss (Doc. No. 100) (lack of plausibility under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009));
- Defendant Himan's Brief in Support of Motion to Dismiss (Doc No. 37) at 29-30 (no duty to Plaintiffs to support negligence claims); 31-34 (deficiencies in malicious prosecution, obstruction, conspiracy, and intentional infliction of emotional distress claims);
- Defendant Gottlieb's Brief in Support of Motion to Dismiss (Doc. No. 39) at 35-41 (deficiencies in malicious prosecution, obstruction, conspiracy, and intentional infliction of emotional distress claims);
- Defendant Addison's Brief in Support of Motion to Dismiss (Doc. No. 41) at 17-23 (deficiencies in malicious prosecution, intentional infliction of emotional distress, and negligence claims); and
- Supervisory Defendants' Brief in Support of Motion to Dismiss (Doc. No. 35) at 44-47 (deficiencies in intentional infliction of emotional distress claims).

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<sup>1</sup> In its original motion (Doc. No. 42), the City did not move to dismiss all of the common law claims brought against the City in the original complaint (specifically, Causes of Action 16-19), as it does here. However, individual City Defendants did move to dismiss those claims, and briefed the issues (as noted above). In addition, the City moved to dismiss a number of analogous common-law claims in the parallel *McFadyen* and *Carrington* matters, and briefed the issues in those cases. See, e.g., City's Brief in Support of Motion to Dismiss, *McFadyen v. Duke University*, No. 1:07-CV-00953 (Doc. No. 62) at 39-45; *Carrington v. Duke University*, No. 1:08-CV-00119 (Doc. No. 73) at 40-45. In accordance with the Court's Order, the City has not addressed these state common law claims in the brief accompanying this motion, which is limited to Plaintiffs' new state constitutional claim, but the City would be pleased to brief these claims should the Court so desire.

Pursuant to this Court's order (Doc. No. 115), those briefs are incorporated by reference in support of this Motion.

3. North Carolina Constitution claim. Plaintiffs' claim premised on an alleged violation of the North Carolina Constitution (Cause of Action 23) is deficient for the reasons described in the supplemental supporting brief accompanying this Motion.

Pursuant to this Court's Order (Doc. No. 115), the City offers and relies on that accompanying brief in further support of this Motion.

WHEREFORE, the City prays that this Motion be granted, that Plaintiffs' claims, as set forth above and in the accompanying and incorporated briefs, be dismissed, and that the City be awarded such other and further relief as is just and proper.

This the 11th day of March, 2010.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.  
Reginald B. Gillespie, Jr.  
North Carolina State Bar No. 10895  
5517 Chapel Hill Boulevard, Suite 2000  
Post Office Box 51729  
Durham, North Carolina 27717-1729  
Telephone: (919) 489-9001  
Fax: (919) 489-5774  
E-Mail: rgillespie@faison-gillespie.com

STEPTOE & JOHNSON LLP

By: /s/ Roger E. Warin  
Roger E. Warin\*  
Michael A. Vatis\*  
Matthew J. Herrington\*  
John P. Nolan\*  
Leah M. Quadrino\*  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
Telephone: (202) 429-3000  
Fax: (202) 429-3902  
E-Mail: rwarin@steptoe.com  
\*(Motion for Special Appearance to be filed)

*Attorneys for Defendant City of Durham, North Carolina*

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing pleading, motion, affidavit, notice, or other document/paper has been electronically filed with the Clerk of Court using the CM/ECF system, which system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the NEF will be transmitted.

This the 11th day of March, 2010.

FAISON & GILLESPIE

By: /s/ Reginald B. Gillespie, Jr.

Reginald B. Gillespie, Jr.  
North Carolina State Bar No. 10895  
5517 Chapel Hill Boulevard, Suite 2000  
Post Office Box 51729  
Durham, North Carolina 27717-1729  
Telephone: (919) 489-9001  
Fax: (919) 489-5774  
E-Mail: rgillespie@faison-gillespie.com

*Attorneys for Defendant the City of Durham,  
North Carolina*